

IN THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF OKLAHOMA

TIMOTHY W. CLAY,  
Plaintiff,

vs.

ASST. DIST. ATT. FERN SMITH et al.,  
Defendants.

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**FILED**

OCT 2 2008

ROBERT D. DENNIS, CLERK  
U.S. DIST. COURT, WESTERN DIST. OF OKLA.  
No. CIV-08-85-W BY W.H. DEPUTY

**ORDER**

On July 2, 2008, United States Magistrate Judge Robert E. Bacharach issued a Report and Recommendation in this matter regarding the Motion to Dismiss filed pursuant to Rule 12(b)(6), F.R.Civ.P., by defendant Susan Caswell, a former judge<sup>1</sup> for the District Court for Oklahoma County, Oklahoma. Magistrate Judge Bacharach recommended that the Court grant in part and deny in part Caswell's request for dismissal. Magistrate Judge Bacharach further recommended that the claim that would otherwise remain, after denial of Caswell's Motion to Dismiss, should be sua sponte dismissed with prejudice under the eleventh amendment to the United States Constitution. The parties were advised of their right to object to the Report and Recommendation, and the matter now comes before the Court on the response filed by plaintiff Timothy W. Clay.

Clay brought suit against Caswell under title 42, section 1983 of the United States Code and sought monetary damages as well as release from his confinement at Davis Correctional Facility or modification of his sentence.

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<sup>1</sup>The Honorable Bill Graves was Caswell's successor, and on July 2, 2008, he was substituted as a defendant with respect to the plaintiff's claims against Caswell in her official capacity. See Doc. 48.

Upon de novo review of the record, the Court concurs with Magistrate Judge Bacharach's suggested disposition of Caswell's Motion to Dismiss and with his recommendations regarding dismissal of Clay's claims for money damages against Caswell, individually, because Caswell enjoys absolute immunity, *e.g.*, Stump v. Sparkman, 435 U.S. 349 (1978), and regarding dismissal of Clay's claims for injunctive relief against Caswell, individually and in her official capacity, because these claims seek injunctive relief (release or modification of sentence) that is not permissible in actions brought under section 1983. *E.g.*, Preiser v. Rodriguez, 411 U.S. 475 (1973).<sup>2</sup>

The Court likewise concurs that summary dismissal of Clay's remaining claim for monetary relief against now-substituted defendant Graves in his official capacity is warranted. Graves in his official capacity as Judge for the District Court for Oklahoma County, Oklahoma, is entitled to immunity from suit for money damages under the eleventh amendment.

Accordingly, the Court

- (1) ADOPTS the Report and Recommendation [Doc. 49] issued on July 2, 2008;
- (2) GRANTS Caswell's Motion to Dismiss [Doc. 34] filed on May 5, 2008, to the extent Clay's claims for monetary damages against Caswell, individually, and his claims

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<sup>2</sup>Clay's remedy is a writ of habeas corpus, and he filed a Petition for Writ of Habeas Corpus on January 17, 2008. Clay v. Jones, No. CIV-08-68-C. That matter was dismissed on June 5, 2008, for failure to exhaust state remedies. *See* Order and Judgment [Docs. 20, 21]. Thereafter, Clay filed an Amended Petition for Writ of Habeas Corpus, and on August 15, 2008, the amended petition was likewise dismissed for failure to exhaust state remedies. On September 24, 2008, Clay sought leave to file a second amended petition, and because he continued to press a mixed claim, that is, one containing both exhausted and unexhausted claims, leave was denied. *See* [Doc. 31].

for injunctive relief against Caswell, individually and in her official capacity, are DISMISSED with prejudice;

(3) DENIES Caswell's Motion to Dismiss to the extent Caswell in her former official capacity sought dismissal of Clay's claims for monetary relief on the grounds of untimeliness; but

(4) sua sponte DISMISSES with prejudice such claims against Caswell's successor, now-substituted defendant Graves in his official capacity; and

(5) RE-REFERS this matter to Magistrate Judge Bacharach for further proceedings.

ENTERED this 2nd day of October, 2008.

  
LEE R. WEST  
UNITED STATES DISTRICT JUDGE